UNITED STATES DISTRICT COURT, D. NEBRASKA

LEROY CARHRAT, M.D., WILLIAM G. FITZHUGH, M.D., WILLIAM H. KNORR, M.D., AND JILL L. VIBHAKAR, M.D., *Plaintiffs*,

v.

JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*.

No. 4:03CV3385.

November 4, 2003.

Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order

PETER D. KEISLER, Assistant Attorney General, Civil Division, MICHAEL G. HEAVICAN, United States Attorney, PAUL D. BOESHART, Assistant United States Attorney, SHANNEN W. COFFIN, Deputy Assistant Attorney General, ANTHONY J. COPPOLINO, Special Litigation Counsel, TERRY M. HENRY, PREEYA M. NORONHA, ANDREW I. WARDEN, Attorneys, United States Department of Justice Civil Division, Federal Programs Branch.

[EXCERPT]

a) The Partial-Birth Abortion Procedure is Plainly Distinct from the Dilation and Evacuation Method of Abortions.

Plaintiffs present a series of assertions that deliberately intermix the terms of the Act, such as "living" fetus, "outside" the mother, and "overt act" to kill in an effort to demonstrate that the terms, individually and taken together, are confusing and could encompass procedures undertaken during a D&E or induction. They state that "[d]uring the course of all D&Es, all of the products of conception will be drawn or expelled through the cervical os and 'outside the body' of the woman." Pls' TRO Mem. at 12. They also state that, "during the course of" a D&E or induction, several routine steps may cause fetal demise- such as rupturing the amniotic sac, dismembering part of the fetus, compressing or making an incision in the skull- but that "there is no way to know the precise cause or timing of fetal demise." *Id.* at 19; *see also id.* at 34 ("during the course of" a D&E or induction abortion, different steps may cause fetal demise "but not immediately").

What such assertions overlook is (i) the definition of partial birth abortion in the Act is structured and worded to encompass a specific procedure performed sequentially and after the fetal head or torso is already outside the body of the mother and (ii) the D&E method of abortion has been repeatedly characterized as an internal dismemberment procedure and readily distinguished from the D&X procedure on which Congress focused. Read as the statute is plainly written, and viewed in the light of established descriptions of D&E, plaintiffs' vagueness claim should be rejected.

First, a partial-birth abortion under the Act requires a specific time and place for the killing of the fetus- in the middle of "delivery" and outside the body of the mother. The Act narrowly and specifically defines a partial delivery as one in which the provider

> (A) deliberately and intentionally vaginally delivers a living fetus until, in

> the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . .

Act, § 3 (to be codified at 18 U.S.C. § 1531 (b)(1)(A), (B)) (emphasis added). Congressional findings in support of the Act likewise describe a partial-birth abortion as

> an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the person knows will kill the partially delivered infant, performs this act, and then completes delivery of the dead infant . . .

Act, § 2(1). The intentional- and sequential- nature of the partial-birth abortion procedure is apparent. First, the physician must deliberately and intentionally partially deliver a living fetus. Second, the delivery is then stopped mid-course. Third, before delivery is completed, the living fetus, which is now largely outside the mother, is then

killed by a separate overt act (usually the removal of cranial matter). Finally, the delivery of the fetus is completed. Moreover, the living fetus must be delivered to a certain anatomical extent outside the body of the mother before it is killed – either its head must be outside the body of the mother, or, in the breech position, the fetus must be removed to a precise anatomical point, the navel.

What plaintiffs have done is taken elements of the definition, such as "living fetus," "outside" the body, and "overt act" to kill and argued that, where these elements exist in other procedures, that method of abortion may be banned by the Act. The fact that, during the course of a D&E or induction, the "products of conception" are removed to a point "outside the mother," or some "overt act" is taken to kill a living fetus, or that the fetus may show signs of life thereafter outside the body, does not render D&E or induction a banned procedure. Under the Act, the specific act to kill the fetus must happen at a particular point and place in time: after the fetus is intentionally delivered outside the mother for the purpose of then inflicting a separate act to kill. The concern that a physician would not know the "precise time" of fetal demise during a D&E, or that a dismembered fetus has a heartbeat after a D&E, is irrelevant. The relevant question is whether a separate act to kill a was inflicted after it was removed from the mother to a specific anatomical point.

Beyond this, the D&E method of abortion has been repeatedly characterized by medical experts on both sides of the debate as an internal dismemberment procedure. Dr. Haskell, who authored the monograph that first alerted Congress and the American public to the use of the partial-birth abortion procedure, distinguished his procedure from "classic D&E in that it does not rely upon dismemberment to remove the fetus . . . . Rather, the surgeon grasps and removes a nearly intact fetus through

an adequately dilated cervix." HJC 7/9/02 at 127. Dr. Carhart testified in *Stenberg* that the D&E procedure requires the doctor to use instruments to grasp a portion (such as a foot or hand) and use the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. *Stenberg*, 530 U.S. at 925-26. Dr. Carhart further testified that, during a D&E, "dismemberment occurs between the traction of . . . my instrument and the counter-traction of the internal os of the cervix . . ." *Id.* At the conclusion of a D&E abortion, Dr. Carhart described the fetus as reduced to "a tray full of pieces." *Id.* at 959.

Indeed, the problem found by the Supreme Court with the definition of the procedure invalidated in *Stenberg* was that it could be construed to encompass vaginal dismemberment of limbs under the D&E procedure. The Nebraska statute held unconstitutional in *Stenberg* prohibited "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, . . . " 530 U.S. at 938 (citing Neb. Rev. Stat. Ann. § 28-326(9)). The Supreme Court concluded that the Nebraska law prohibited D&E abortions because a "D&E will often involve a physician, pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." *Id.* at 939.

The Supreme Court's concerns over the language expressed in *Stenberg* are not implicated here. The language crafted by Congress no longer provides that the procedure is performed inter-vaginally, but on a living fetus that is outside the mother's body. Congress also replaces the language that a "substantial portion" of the fetus is pulled into the vaginal area, with language that the fetus is removed outside the body to at least a specific anatomic landmark – either the "entire fetal head" is outside the mother or, in the breech presentation, any

part of the fetal trunk past the navel. This language is unquestionably much more specific than the language in Stenberg.

For these reasons, various scenarios raised by plaintiffs in which a D&E abortion might fall under the language of the Act, such as because the cervix has prolapsed into alignment with the vaginal introitus, do not render the Act unconstitutionally vague. In light of the clearly structured definition in the Act, and the established description of the D&E procedure, plaintiffs' self-serving and untested affidavits cannot be credited at this initial stage. Unverified assertions about what could happen during a D&E or induction not only confuse the elements of the partial-birth abortion procedure, but miss the key overall point – the Act is intended to prohibit a procedure by which a living fetus is intentionally drawn partially outside the body of the mother for the purpose of killing it in the middle of delivery. Also, "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Petrillo*, 332 U.S. at 7 (citation omitted). When it is abundantly clear from eight years of legislative history containing substantial medical evidence that Congress intended to prohibit a specific procedure in which a partially-born fetus is killed in the middle of delivery, the existence of some borderline situations does not rise to a level of vagueness that justifies invalidating the Act. *See United States v. Harriss*, 347 U.S. 612, 618 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise.") (citing *Petrillo*, 332 U.S. at 7).

> The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws

> which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

Petrillo, 332 U.S. at 7.

Finally, plaintiffs' critique the Act for not containing a viability line, not demarcating specific abortion procedures that are not affected, not including the word "intact," or not describing procedures regarding the suctioning of skull contents. *See* Pls' TRO Mem. at 32 n.31. These points are easily addressed. Congress' decision not to legislate these distinctions does not render the Act it did write impermissibly vague. Congress could justifiably find that the precise point of viability may change, and that the destruction of a late term, living fetus outside the womb is just as objectionable, even if the fetus quite near, but not yet past, viability. Also, utilizing the term "intact" in the Act would presents an obvious loophole that would allow the virtually identical procedure to occur where a single fetal toe had been dismembered. Lastly, defining the specific overt act to kill as solely suctioning of brain content again would permit the identical procedure – the killing of a living fetus outside the body and inches from a complete birth – to proceed through some other means of killing. The point of the legislation was to prohibit the destruction of a living fetus inches from an autonomous existence. That Congress chose not to legislate the limitations plaintiffs' cite in no way renders the Act unconstitutionally vague.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 Civ. 8695 (RCC)

NATIONAL ABORTION FEDERATION; MARK I. EVANS, M.D.; CAROLYN WESTHOFF, M.D., MSC; CASSING HAMMOND, M.D.; MARK HELLER, M.D.; TIMOTHY R.B. JOHNSON, M.D.; STEPHEN CHASEN, M.D.; GERSON WEISS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Plaintiffs,

v.

JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE U.S., ALONG WITH HIS OFFICERS, AGENTS, SERVANT, EMPLOYEES, AND SUCCESSORS IN OFFICE,

Defendants.

New York, N.Y.
Before:
HON. RICHARD CONWAY CASEY
District Judge

TRIAL TRANSCRIPT EXCERPTS

Cassing Hammond, M.D. (619:5 – 620:9)

Q. Doctor, I am referring back to the first topic you raised as opposed to the second. The second one was your opinion that the ban is broad and vague. The first was that you, I believe, stated that the findings contained different information than the definition that is contained in the Act's ban. Am I understanding your testimony correctly?

A. You are.

Q. Can you explain what you mean by that.

A. There are several things that are discussed in the findings that aren't actually included in the ban itself. If you would like, I can identify some of those.

Q. That would be great.

A. If you go back to the beginning of the findings section -- again. this is section 2, findings -- let me look here and make sure I am referring to the right place.

THE COURT: Are you saying, Doctor, that some of these things you are talking about that are effects are not in the ban? Would you expect the effects to be in the ban? I know you are not a lawyer, but isn't it rather obvious?

THE WITNESS: No, I don't think I am talking about effects, your Honor.

THE COURT: You have been through all of those and you have noted those you agree with and disagree with,

but I don't know that your statement makes any sense to me.

THE WITNESS: There is some language that is used to define or describe partial-birth abortion in the findings that doesn't appear in the ban at all. So I don't know if what is banned necessitates that I do those actions listed in the findings or not. They are different. They describe partial-birth abortion in different ways.

Carolyn Westhoff, M.D., MSc. (845:2 – 846:1)

Q. Dr. Westhoff, without enumerating them, have you perceived any differences between language that describes a certain abortion procedures in the findings of the statute and language that appears in the text of the ban in Section 1531(b) (l)?

A. Yes. The ban is more general than the findings.

Q. Mindful of the Court's ruling I'm not going to take you through those differences but instead will ask you this: What impact, if any between those differences, between the text of the ban in Section 1531(b) (1) and the text in the findings, have on your ability as a physician to determine what conduct is prohibited by the ban?

A. The language –

THE COURT: Doesn't your question presume a fact that hasn't been established?

MR. HUT: I said what difficulty if any, your Honor. What impact, if any -- at least I certainly intended to.

THE COURT: All right.
Can you answer that question?

THE WITNESS: Reading the ban, the language is more general and brief than in the findings. And it appears that it could apply to a broader range of D&Es that I perform including D&Es that involve dismemberment because it doesn't say anything about intact. And, therefore, it's really difficult for me to tell when I am actually doing a case exactly whether I would be violating the ban.

Charles Lockwood, M.D. (1877:7 – 1878:18)

Q. In December you found distressing the Act's imposition of penalties on doctors, right?

A. Still do.

Q. You think that the imposition of criminal penalties unravels the physician's social contract with his or her patients, right?

A. Correct.

Q. Because part of that contract is a right of patients to expect doctors to do their very best for them, right?

A. Correct.

Q. You also thought in mid December 2003 that it was entirely unconscionable for Congress to incur civil suits, right?

A. Very much so.

Q. And you still do, right?

A. Very much so.

Q. In December, before you spoke with counsel for the government, you believed that the Act's language was so imprecise that it just doesn't prohibit intact D&E is but also threatens all abortions, right?

A. Correct.

Q. So when you first read the Act as a practicing physician without conferring with government lawyers, you believed it was written in a way that threatened all abortions, right?

A. I wrote what I wrote.

Q. And you did believe that, right?

A. Correct. To be fair to all sides, I had reviewed the expert reports of your plaintiffs, and that may have added to my sense of urgency and concern.

Q. In fact, in your opinion, the wording of the Act is such that you can certainly understand why the plaintiffs' experts opined as they did concerning the Act's threat, right?

A. Correct.

Q. You still agree, don't you, Dr. Lockwood, that if the Act is not interpreted the way you believe appropriate, it is not only vague but worse, right?

A. If it is interpreted in a way that leads to a lack of access to pregnancy terminations, that would be a problem.